expression "subject to contract" in clause 1 of the written option clearly indicates that the execution of a further contract is a term or condition of the bargain and there is therefore no binding contract of sale binding on the respondents to sell the property in question to the appellants.

For these reasons we dismiss the appeal with costs and order that the deposit be paid to the respondents or their solicitors.

Appeal dismissed.

Solicitors: *Drew & Napier; Hilborne & Co.*

MALAYSIAN REPORTS

JANAKI & ANOR. v. CHEOK CHUAN SENG & ORS.

[O.C.J. (Wan Suleiman J.) October 3, 1972]

[Seremban — Civil Suit No. 182 of 1970]

Land Law — Trespass to property resulting in inundation by sea water — Exemplary damages — When will be awarded.

Damages — Exemplary damages — Trespass to property — Inundation by sea water — When justified.

The plaintiffs claimed that the defendants the owners of land opposite their land and separated therefrom by a road had wrongfully entered and trespassed upon their land, digging a canal and widening and deepening an existing drain thereon. In consequence, the plaintiffs averred that their land had been made unsuitable for cultivation or other use, there being imminent danger of sea water inundating their land.

The defendants whilst not denying that they had been on the plaintiffs' land denied that there had been wrongful entry or trespass, contending that they had obtained prior licence from the plaintiffs' manager and agent to do so, and that such dredging would prevent future flooding of land belonging to both parties.

There was evidence to inundation by sea water resulting in dying of trees on the plaintiffs' land.

Held: (1) the defendants were liable to the plaintiffs for the damage caused by inundation by sea water to the estimated amount of $2,560;

(2) as the defendants brazenly and in complete disregard of the plaintiffs' right of property entered upon the latters' property to dredge the existing canals and through their servant resorted to threatening behaviour, exemplary damages fixed at $2000 should be awarded to the plaintiffs.

Cases referred to:

(1) *Loudon* v. *Ryder* [1953] 2 Q.B. 202.

(2) *Davis* v. *Bromley U.D.C.* [1903] 67 J.P. 275.

CIVIL SUIT.

N. Ramachandran for the plaintiffs.

Lee Boon Peng for the defendants.

Wan Suleiman J.: Plaintiffs who are the registered proprietors of Lots 3327 and 3323, in the Mukim of Jimah, District of Port Dickson, land which adjoins the sea coast claim that defendants the registered proprietors of land opposite plaintiffs' land and separated therefrom by a road, had on or about 16th October, 1970 wrongfully entered and trespassed upon both lots, digging a canal in one and widening and deepening an existing drain on the other. In consequence, plaintiffs aver that their land had been made unsuitable for cultivation or other use, there being imminent danger of sea water inundating their land.

Defendants whilst not denying that they had been on plaintiffs' land deny that there had been wrongful entry or trespass, contending that they had obtained prior licence from plaintiffs' manager and agent to do so, and that such dredging would prevent future flooding of land belonging to both parties.

Since the burden of proving such consent lay upon the defendants, who would fail if no evidence at all were given on either side, I ruled that the defendants should begin.

Second defendant Choh Hong Kee @ Cheok Kien Yap said that he and the other three defendants were the co-owners of Lot No. 49, which was opposite plaintiffs' land. In October, 1970 owing to rain, both

their land and that belonging to plaintiffs, being low lying, were under water.

He claimed that two canals passed through his land, and then through plaintiffs' land and thence to the sea; and that both these canals had been there when he and the others had purchased the land in 1965. The plaintiffs it should be noted had purchased their land from defendants.

The existence or otherwise of these two canals raise the next important issue, for the defendants' claim that all they had done was to dredge for the purpose of clearance of debris and deepening two existing canals on plaintiffs' land, whereas the plaintiffs assert that defendants had dug a canal on Lot 3327 where there was none before and had considerably enlarged a mere drain on Lot 3323.

A public road separates the defendants' property from plaintiffs', and second defendant contends that the two culverts going under the road are there to enable the two canals to pass under them and then onto plaintiffs' land. It is also common ground that a stone-and-cement bund runs parallel to the sea shore running almost the entire length of the various adjoining lots belonging to plaintiffs including the two lots referred to in the statement of claim. What second defendant describes as a canal runs parallel to this bund with which the two canals connect.

Defendants produced a set of photographs Exhibit D3 A to I taken according to the affidavit of the photographer Exhibit D4 on 21st December, 1970 *i.e.* three days after Shanmugam had complained of the trespass to the police. Exhibit D3 A shows the canal on defendants' land which runs through the culvert below the road into Lot 3327. Exhibit D3 B is the canal on Lot 3327. Exhibit D3 E shows the other canal on defendants' land which, flowing through the culvert shown in the picture, reappears on Exhibit D3 F in plaintiffs' land, Lot 3323. Photograph D3 F gives an indication of the size of the culverts, and gives in my view a good indication as to whether there were pre-existing canals in both Lots 3327 and 3323 linking up with the two canals on defendants' property at the time the road was laid out.

Second defendant said that after he had dredged the canals on his land but water had remained stagnant, Shanmugam, husband of first plaintiff, had by chance met him on 14th October, 1970 whilst going to his land and at defendant's request had replied that he could dredge the portions of the canals on plaintiffs' land provided he (Shanmugam) did not have to pay for the work.

He had used the mechanical excavator to do the dredging, and on 15th October, 1970 the excavator "kepala" commenced to dredge on plaintiffs' land, on the canal on Lot 3323.

About 10.30 a.m. on the 18th October, the kepala had phoned him to say that 3 or 4 Indians carrying axes and knives had taken photos of him, and when he had asked why they were doing so, had quarrelled with him.

On going there he had seen Kunchi Raman and 2 or 3 others including Shanmugam quarrelling with the kepala. On his intercession they returned home. Shanmugam had walked onto his land without speaking to him and no one had asked him to stop dredging on plaintiffs' land on 18th October.

On 19th October the excavator was on Lot 3327 when he was informed that Shanmugam had objected to the dredging on that day — he had asked the kepala (Cheok Ong Koo) to remove it from plaintiffs' land.

Under cross-examination defendant said that Shanmugam had not, on 18th October objected to the dredging on plaintiffs' land, and merely took photographs. He denied ever having threatened Shanmugam with violence, to dissuade him from taking photographs and went so far as to say that he had asked the kepala not to object to the photographing.

It should be noted that in his report to the police made on 21st October, 1970 (Exhibit P8) he made no mention whatsoever of Shanmugam having given him permission to dredge on plaintiffs' land.

Defendant admitted that he had not told the police corporal when police came to stop the dredging that he had obtained permission to do so, but claimed that he had mentioned this in the report — which of course is not correct.

I shall have more to say about this report later.

According to the second defendant, his kepala had told him he had tried to stop the Indians from damaging oil palms on plaintiffs' land, fearing he and his men might be blamed for it, and this had caused the quarrel.

Defendant was unable to provide any reason for what he claims to be Shanmugam's sudden change of mind after having given him permission to dredge.

Again contrary to what appears in his report defendant, who according to it had been told by his kepala of the cause of his quarrel with the Indians, repeated on being recalled, that when he saw Shanmugam after his kepala's complaint on the phone had brought him to the scene of the dredging, that he would speak to him again "when I found out from my kepala what was wrong". I have noted that this change in his story must have been influenced by Cheok's certainty that he had spoken to Shanmugam.

Pakiri (DW3) a bulldozer driver and amateur photographer who had accompanied Shanmugam on the morning of 18th October, 1970 to the land said that the latter had asked him to take photos of the excavating machine and had bent some oil palm branches in order to assist him in getting a clear picture. When he got back to the road, Cheok who appeared to be angry asked him for the films, which he handed over to him out of fright. Pakiri said that later the same day he returned to the scene with the detective Kunchi Raman and Shanmugam but declined to take photographs, still being in fear of defendant and his workmen.

The kepala Cheok Hong Kow said that he had been employed to look after defendants' land ever since it was purchased and the two canals running across the land, through the culverts under the road and across plaintiffs' land were already there. Prior to October, 1970 a Javanese sub-contractor had dredged the canals (though he did not mention whether this

included plaintiffs' side of these), and he had at times seen the plaintiffs watching the operation. It is fair to infer that if such work had been done on plaintiffs' land, no permission had been obtained for he would otherwise have said so. He was present and had heard Shanmugam grant permission to second defendant to dredge the canals on his side on condition that it was to be free of charge. Cheok too maintained that the work involved only dredging for debris, not deepening.

His account of Pakiri's surrender of the films was very different from the latter's for he claimed that Pakiri had voluntarily exposed the films on being told by him that Shanmugam's breaking of the palm tree branches was done for the purpose of putting the blame on defendant and his workmen.

He also said that at no time on 1st October, 1970 did Shanmugam ask him to stop dredging or to leave plaintiffs' land, and he had gone onto plaintiffs' land to dredge the canal shown on photo Exhibit D10 after Shanmugam had left, on second defendant's orders. Second defendant he said assured him he would "patch up" Cheok's quarrel with Shanmugam over the oil palm leaves.

It is difficult to understand why this man who claims to be aware that his employer had obtained Shanmugam's permission to dredge canals on his land, had jumped to the curious conclusion that the latter had broken the branches in order to place the blame on him.

Confining ourselves for the moment to the question of whether second defendant had Shanmugam's permission to enter and to dredge upon plaintiffs' land, this is what Shanmugam has to say. Shanmugam admitted that he was the agent for all the 8 Lots (Lots 3322 to 3329 — see Exhibits D2 A and D2 B) including Lots 3323 and 3327 which plaintiffs had purchased from defendants.

The bund between plaintiffs' land and the sea shore was only partially intact, the first and last lots being unprotected. There had been no outlet in any part of bund to allow water to flow out into the sea until he made one on Lot 3322. He denied that there had been any breach in the bund on Lot 3327 (shown in photo Exhibit P11) at time of the purchase and denied that he had made it. The first time he had seen it was after this incident. It followed that there was neither any pipes leading to the sea on the other side of this breach nor a canal (shown on photo Exhibit D9) leading through Lot 3327 to the breach.

This canal he had first seen at 7 a.m. on 17th October, 1970. The previous day he had been told that an excavator was digging on plaintiffs' land and on the advice of his solicitors had caused the photograph to be taken at 11 a.m. on 17th October. The crane operator had told him that his "towkay" had asked him to dig. Apparently he had asked the operator to stop digging because when he returned with Pakiri (DW3) and another on the next day — 18th October, he demanded to know why he was still digging despite that. Then happened the incident where Cheok (DW4) had threateningly demanded and obtained negatives from Pakiri, a happening it should be noted which that witness called by the defendants confirmed.

He then went off with his companions to purchase another roll of film and on the way back met PW3, the detective, who confirms in all essential respects his complaint, and what he had told him about his (Shanmugam's) conversation with second defendant on this second visit to the scene on 18th October.

Shanmugam's conversation with second defendant is highly enlightening. When he asked second defendant why he was digging on plaintiffs' land, the latter had replied that it was to enable water from his (Shanmugam's) drain to run out. When Shanmugam pointed out that there was a PWD drain running alongside defendants' land (*i.e.* parallel to the road) which he could use as his outlet, he retorted angrily that he had sold plaintiffs the land very cheaply and that he would buy the land back. Because of second defendant's threats, he had not taken any more photographs, but returned home.

His police report made the next day — 19th October contains in substance this account of the happenings of 18th October. It was only after making this report, and after a police sergeant had asked the crane operator to stop working on plaintiffs' land, had digging operations been discontinued.

A number of improbabilities are apparent when the defendants' assertion that second defendant had obtained Shanmugam's permission to dig or dredge, on plaintiffs' property on 14th October is scrutinized. Why had Shanmugam then gone to seek legal advice, and in pursuance thereto had taken two photographs as evidence of the alleged trespass only three days later?

Again, remembering that Cheok was admittedly aware of such permission why had he objected to Shanmugam taking photos — even if such snapshots had been of plaintiffs' own palm trees whose branches he (Shanmugam) had himself broken? I fail to comprehend how such an inoffensive act can conjure in the mind of one fully aware of the lawfulness of his actions suspicious of intention to trump up allegations.

That Cheok did not merely plead with Pakiri, but was threatening in his demand for the films I have no doubt whatsoever. Pakiri's evidence in this respect — and he was called by the defendants — should dispel any doubts on this score.

On the top of all this, second defendant's report, not made in haste, but on 21st October — three days after the confrontation had commenced, makes no reference whatsoever to this most vital fact of permission obtained. It would be reasonable to expect anyone in second defendant's position to proclaim that he had prior permission to be on plaintiffs' land. Instead he said nothing of that sort.

I think the irresistable conclusion must be that second defendant had not obtained Shanmugam's permission to use the excavator on plaintiffs' land, and having been found thereon using it for the purpose of facilitating the drainage of defendants' land, had in flagrant disregard of Shanmugam's objections, continued to work on it until the police intervened.

That leaves only the question of quantum of damages to be awarded to plaintiffs, and this would largely depend on whether defendants' use of the excavator on plaintiffs' property, and any other act on their part had as alleged in the statement of claim resulted in making the land unfit or unsuitable for cultivation, had caused imminent danger of inundation by sea water and had otherwise caused damage.

According to the Asst. Collector, Port Dickson (DW6), a previous owner of both Lot 99 (which now on subdivision comprises Lots 3322 to 3329 — plaintiffs' property) and defendants' land, Lot 49, both lots were subject to tidal flooding (see Exhibit D21 A and D21 B). Of the two "tide water gates" appearing on plan D21 B, one appears to run approximately through plaintiffs' Lot 3327. Letter Exhibit D21 A dated 10th December 1959 is an appeal to the collector to repair this "tide water gate".

According to Shanmugam, there was a pipe leading through the bund on Lot 3322 leading to the sea (see Exhibit P3 G) and when plaintiffs purchased the land a drain 4 feet wide ran from Lot 3329 to Lot 3322 along the landward side of the bund. The drain he dug on Lot 3323 (2½ feet wide x 1½ feet deep before the incident) led to this other drain. The former drain, he complained, had been enlarged by defendants to canal size — 10 feet wide to a length of about 100 feet. However he admitted that the drain he had dug on Lot 3323 was to enable water to flow more rapidly to the sea, presumably through the pipe leading through the sea bund, already on Lot 3322.

Photo Exhibit D3 A shows the canal on defendants' land and one side of the culvert which goes under the road reappearing on the opposite side on plaintiffs' Lot 3327 — Exhibit D3 E shows the canal and culvert on defendants' land, and this canal flows through the culvert under the road reappearing on plaintiffs' Lot 3323 as shown in Exhibit D3 F. The road was admittedly built after plaintiffs had purchased the land Shanmugam suggested however that prior to defendants' trespass it was possible that the PWD had built these culverts, not to ensure flow of water between canals on both sides of the road, but so that water from land on both sides would flow to the canal running by the roadside on defendants' side possibly to a large drain near Lot 3330.

Regarding the canal on Lot 3327, the mechanical engineer called by plaintiffs was of the opinion that a good operator on firm terrain working a 14 hour day could dig a canal 8 feet x 10 feet x 300 feet — or should a canal 100 feet longer than that on the land (8 feet x 10 feet x 198 feet) but under cross-examination he admitted that assuming the matting shown on Exhibit P13, on soft ground (the relevant period it should be noted was rainy), it would take 8 to 10 days to excavate a canal of that dimensions. Both sides do not dispute that these canals were about 8 feet deep (see statement of claim paragraph 3). On this basis, the canal on Lot 3327 would have taken about 2/3rd of that time — *i.e.* 5 to 7 days, and not 3 days, and that on Lot 3323 about 3 days and not a day *i.e.* on 19th October, 1970.

The canal on Lot 3327, if dug between 15th and 18th October, 1970, would necessitate the excavation of some 16,000 cu. ft. of earth, an enormous quantity of material and even assuming that it was scattered would be plainly visible on photos Exhibit D9 (taken on 17th October 1970) and on Exhibit D3 B (taken according to affidavit Exhibit D4 — 5 days later).

The allegedly enlarged waterway shown on Exhibit D3 F (taken on 21st October 1970) on Lot 3323 should also show mounds of earth. Instead what is visible on Exhibit D9 would tend to support defendants' contention that only mud and debris *i.e.* a lesser amount of matter at the bottom of existing canals had been dredged on both these lots.

The culverts are further indication that on the balance of probabilities, at the time the road was constructed water had flowed from defendants' land to plaintiffs', and that such flow had been through well defined canals on plaintiffs' side as well.

I am inclined therefore to believe what Mohamed Said (DW2), who was Penghulu of that area said about the existence of these two canals connecting defendants' and plaintiffs' land long before defendants purchased the land — (though he mistakenly calls one of these canals Parit Sungei Chuah).

It seems to me that the plaintiffs have not been telling the truth in claiming that both the canals on Lots 3323 and 3327 had been dug by defendants during their action of trespass. I am unable to understand why the surveyor PW2 should lend himself to support an assertion which is palpably false. He was certainly not a very observant person because during his visit, specially made in June, 1971, in anticipation of this trial, he had failed to see the canal on defendants' land whch led into Lot 3323, *i.e.* Exhibit D3 E. There must be some doubt as to whether he had made a thorough survey himself, or had delegated portions of the area to be surveyed by assistants.

I think it would be safe to accept without question the fact that somewhere in the bund near the boundary of Lots 3327 and 3328 was a breach at least at the time the petition in Exhibit D21 was made in December, 1959 — at the "tidal water gate".

It is admitted by the defendants that they had dug the trench leading from the "breach" or culvert as they call it in the bund there to the sea and that they had done so after 19th October, 1970, and that they had subsequently buried pipes there to carry water to the sea, in place of old pipes already there. This breach in the bund is shown in Exhibit P11, the depression in the foreground being part of the canal on Lot 3327 (see Exhibits D3 B and D3 C).

Photos of this breach taken on 16th October, 1971 at close quarters are Exhibits D20 A and D20 B. Shanmugam however claims that this breach was not there at the time plaintiffs purchased the land and that he first saw it after the incident. Whilst it is possible that the defendants enlarged this breach, the existence of the so-called tidal gate there in 1959 inclines me to the view that a breach of some sort was still there at the time plaintiffs purchased the land.

I do not think there can be any dispute that both the defendants' land and all the lots belonging to plain-

tiffs need proper drainage to enable water to flow out to the sea since they are low lying. Shanmugam himself admits that to enable water to flow from plaintiffs' land to the sea he had made an opening on the bund at Lot 3322. However he complained that because of the breach in the bund made by defendants and the canal they dug on Lot 3327, sea water would inundate that lot, as shown in photo Exhibit P18 twice monthly (at spring tides?). It is very likely that the enlarged culvert or breach shown in Exhibit D20 A and B, without a proper device to prevent sea water from flowing inwards may well aggravate flooding during spring tides, though in view of the existence of the canals even before this incident, and the breach in the bund on Lot 3322 made by Shanmugam, periodical inundation by sea water would I am certain have occurred to some degree even without defendants' interference.

However, the evidence of PW5 Mr. Nagalingam would tend to show that the trees on Lot 3327 said to have been planted in October, 1967 began to die about three years later *i.e.* at about the time of the incident, and that inundation had been the cause. I have no reason to doubt Mr. Nagalingam's conclusions and would therefore hold defendants liable for this item of damage, which according to his estimate, which I accept, would amount to $2,560.

As I had remarked earlier in this judgment I have not the slightest doubt that the defendants had brazenly, in complete disregard of plaintiffs' right of property not only entered upon the latter's property to dredge the existing canals, but had remained thereon despite Shanmugam's objection, and had through their servant the kepala resorted to threatening behaviour when Shanmugam had lawfully tried to take photographic evidence. Only police intervention had dissuaded them from prolonging the trespass. Exemplary damages are called for in such instances. As Devlin J. said in *Loudon* v. *Ryder*[1] such punitive damages could be awarded on the basis of "a fine which has to hit the defendant hard and to show that that sort of conduct does not pay".

In *Davis* v. *Bromley U.D.C.*[2] in which the defendant council wrongfully entered upon plaintiff's land and demolished a wall he was erecting thereon it was held that the measure of damages was not confined to the actual pecuniary loss sustained by plaintiff, but might also include compensation for matters of aggravation.

Whilst the trespass in *Loudon's* case, *supra*, somewhat more violent and physical in nature merited the award of £4,000 for combined assault and exemplary damages. I do not think that a sum of $2,000 for this flagrant disregard of proprietory rights would be unjust and accordingly, I award the plaintiffs the sum of $2,000 under this heading.

The plaintiffs are also granted the injunction sought in their second prayer and the costs of this action.

Order accordingly.

Solicitors: *N. Ramachandran & Co.; Lee Boon Peng & Co.*

LEE THEAN CHYE v. LIM CHOW CHONG

[A.C.J. (Syed Agil Barakbah J.) January 8, 1973]

[Alor Star — Civil Appeal No. 8 of 1972]

Practice and Procedure — Defence — Failure to file defence in prescribed form — Defence given in letter — Irregularity — Whether defendant should be precluded from defending the action — Subordinate Courts Rules, 1950, O. 10 rr. 3(1), 4 and 7.

The respondent brought a claim against the appellant for arrears of rent. The defence was not filed within the time required and the learned magistrate gave the appellant time to file the defence within a week. Subsequently the appellant filed a statement of defence in the form of a letter addressed to the magistrate and a certified copy to the respondent's solicitors. When the case came up for trial, the learned magistrate made an order precluding the appellant from defending and gave judgment in favour of the respondent with costs. The appeallant appealed.

Held: (1) the failure to comply with the requirements of Order 10 rule 3(1) of the Subordinate Courts Rules in not filing a defence in the prescribed form was an irregularity which could be cured;

(2) the learned magistrate in this case ought to have proceeded with the hearing and if he was of opinion that the statement of defence should be submitted in the proper form, he could have adjourned the case for the purpose;

(3) the appeal should therefore be allowed and the appellant ordered to submit a statement of defence in the proper form within a week.

Cases referred to:

(1) *Foo Chiew Fong* v. *Guriman* [1957] M.L.J. 51.

(2) *Abdul Rahman* v. *Paijah* [1937] M.L.J. 93.

(3) *Grey* v. *Kong* 1 F.M.S.L.R. 162.

CIVIL APPEAL.

Karpal Singh for the appellant.

Tan Seng Jim for the respondent.

Syed Agil Barakbah J. (delivering oral judgment): This is an appeal against the decision of the learned magistrate, Langkawi, given on the 22nd day of March, 1972, in favour of the respondent (plaintiff in the court below). Judgment was given against the appellant (defendant in the court below) in the sum of $305 and costs, on a claim by the respondent for four years' rent amounting to $265 and eight months' rent of a lean-to shed situated on the land belonging to the respondent in the sum of $40.

There are two grounds of appeal. The first ground is that the learned magistrate erred in law in precluding the appellant from defending the action on the ground that the defence was not in proper form under O.10 r.3(1) of the Subordinate Courts Rules; and, secondly, in not considering that the appellant had a *prima facie* defence.

Now, O.10 r.3(1) states: —

"If a defendant desires to defend the whole or any part of the claim he shall, not less than two days before the return date on the summons, or within such further time and on such terms as the court may allow, file and cause to be served on each plaintiff a defence in Form 6. A set-off may be pleaded by way of defence."

O.10 r.7 states that if a defence is not filed or does not disclose any defence to the claim or is not in proper form, the court may in its discretion direct that the party in default be precluded from defending the claim. The sequence of this case as noted by the learned magistrate is that the defence was not filed